

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LESLIE A. POUNDS,

Plaintiff,

v.

KELLY KING, *et al.*,

Defendants.

Case No. C06-314-BHS-MJB

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff Leslie Pounds is a Washington State prisoner who is currently incarcerated at the Monroe Correctional Complex-Washington State Reformatory Unit (“MCC-WSRU”). He brings this action under 42 U.S.C. § 1983 to allege that the named defendants have denied him adequate medical care in violation of his rights under the Eighth Amendment to the United States Constitution. Plaintiff also alleges that defendants have violated the due process and equal protections rights guaranteed him by the Fourteenth Amendment, that defendants were negligent, and that defendants committed medical malpractice. Plaintiff identifies as defendants in this action Kelly King and John Loranger, both physician’s assistants employed at MCC-WSRU at times relevant to the complaint; David Kenney, M.D., Medical Director at MCC-WSRU; James Champoux, M.D., a contract

REPORT AND RECOMMENDATION

PAGE - 1

1 physician at MCC-WSRU; and, the Washington Department of Corrections. Plaintiff seeks
2 declaratory and injunctive relief, and damages.

3 Defendants now move for summary judgment. This Court, having reviewed defendants'
4 motion, and the balance of the record, concludes that defendants' motion for summary judgment
5 should be granted and that this action should be dismissed with prejudice as to petitioner's federal
6 constitutional claim and without prejudice as to plaintiff's negligence and medical malpractice
7 claims.

8 FACTS

9 On December 3, 2003, plaintiff injured his back while working as a machine tool
10 operator/programmer for Microjet, a class I correctional industry. (*See* Dkt. No. 52-2 at 7.) Plaintiff
11 was able to walk back to his cell after the injury. (Dkt. No. 50-2 at 23.) He did not seek immediate
12 medical attention for the injury. (*See id.*) On December 7, 2003, four days after the incident,
13 plaintiff asked corrections officers to help him out of bed and take him to the prison hospital. (*Id.* at
14 24.) The clinic nurse checked plaintiff's vital signs and called the on-call physician's assistant
15 ("P.A."), John Loranger. (Dkt. No. 50-3 at 16.) P.A. Loranger authorized the administration of
16 Toradol, a pain reliever, and Robaxin, a muscle relaxant. (*Id.*) Plaintiff was also authorized to
17 receive an extra pillow or blanket to put under his knees to reduce the stress on his back. (*Id.* at 25.)
18 The Toradol and the extra pillow apparently provided plaintiff some relief. (*Id.* at 17.) Plaintiff was
19 directed to return to medical the following day for further evaluation. (*Id.*)

20 On December 8, 2003, plaintiff was seen in the clinic by P.A. Loranger. (Dkt. No. 50-3 at
21 46.) Plaintiff reported to P.A. Loranger that he was experiencing low back pain and that he had a 30
22 year history of similar problems. (*Id.*) Plaintiff also reported that the Toradol and Robaxin
23 administered to him the previous day had provided him some significant relief, but that his symptoms
24 had returned when he woke up that morning. (*Id.*) Following his examination of plaintiff, P.A.

1 Loranger diagnosed low back pain with left paraspinal spasm and developed a treatment plan which
2 included providing plaintiff with nonsteroidal anti-inflammatories and muscle relaxants, a work belt
3 to assist his posture, time off from work. (Dkt. No. 50-3 at 46.) Plaintiff was instructed to return in
4 a week if plaintiff continued to experience problems. (*Id.*)

5 Plaintiff returned to medical on December 16, 2003, and reported that he was continuing to
6 experience back pain. (*Id.* at 18.) The nurse who evaluated plaintiff instructed him to continue
7 taking the medications ordered by P.A. Loranger, and to sign up to see a provider if his symptoms
8 persisted or worsened. (*Id.*) Plaintiff was seen again by P.A. Loranger on December 18, 2003. At
9 that time, plaintiff complained of lower back pain and muscle spasms and P.A. Loranger admitted
10 plaintiff to the hospital for treatment. (*Id.* at 18 and 65.)

11 Following his admission to the hospital, plaintiff was evaluated by Dr. David Kenney. (*See*
12 *id.* at 36-38.) Plaintiff received steroid injections and he was also prescribed pain relievers and
13 valium. (*Id.* at 37-38.) On December 19, 2003, plaintiff reported to hospital staff that the pain had
14 gotten better since he received the injections. (*See id.* at 39-40.) The following day, plaintiff denied
15 experiencing any pain or spasms, and refused pain medication. (*See id.* at 40-42.) On December 21,
16 2003, plaintiff again denied having any lower back pain and he was released from the hospital. (*Id.*
17 at 42.)

18 Because plaintiff was injured while working at a class I correctional industry, he was eligible
19 for industrial insurance benefits as provided by Title 51 of the Revised Code of Washington. *See*
20 RCW 72.60.102. On January 8, 2004, P.A. Loranger arranged for plaintiff to come in to fill out a
21 worker's compensation claim form. (*See id.* at 20 and 65.) Once completed, the paperwork was sent
22 on to Dr. Kenney for processing. (*Id.*)

23 On January 21, 2004, plaintiff had another appointment with P.A. Loranger during which
24 plaintiff requested a cane to assist him with his walking. (*Id.*) P.A. Loranger prescribed a cane for
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1 plaintiff's use. (Dkt. No. 50-3 at 20 and 65.) P.A. Loranger also noted in plaintiff's record that
2 neither plaintiff nor the medical department had received any word from the Department of Labor
3 and Industries ("L&I") regarding plaintiff's worker's compensation claim and that the medical
4 department would contact L&I to make sure that they had all of the necessary paperwork.¹ (*Id.* at 20
5 and 65-66.) Apparently they did not as the record indicates that MCC faxed the worker's
6 compensation form to L&I on January 28, 2004. (*Id.* at 53-55.)

7 On February 17, 2004, plaintiff saw P.A. Loranger again for a follow-up on his lower back
8 pain. (*Id.* at 20.) Plaintiff reported that he had gotten a response from L&I with a claim number and
9 that he was doing about the same. (*Id.*) P.A. Loranger noted in plaintiff's medical record that the
10 medical department was going to check on the progress of plaintiff's L&I claim. (*Id.*) P.A.
11 Loranger made an entry in plaintiff's medical record on February 20, 2004, indicating plaintiff's
12 worker's compensation claim number. (*Id.* at 21.) This is the last entry made by P.A. Loranger in
13 plaintiff's medical records.

14 On March 18, 2004, plaintiff filed a grievance complaining that he had not received adequate
15 medical attention from the MCC-WSRU medical staff for his injured back. (Dkt. No. 52-2 at 68.)
16 Plaintiff asserted in his grievance that the only care he had been provided was pain medication and
17 promises that other medical procedures had been scheduled. (*Id.*) Plaintiff requested that the
18 medical staff follow through with his case and provide him the care he was entitled to through his
19 L&I insurance. (*Id.*)

20 On March 24, 2004, P.A. Kelly King completed a consultation request for plaintiff to see
21 James Champoux, M.D., an orthopedic surgeon, for evaluation and treatment. (Dkt. No. 50-3 at 48.)

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23 ¹ Plaintiff asserts that P.A. Loranger advised him during this appointment that an MRI had
24 been scheduled. (*See* Dkt. No. 48 at 5.) Plaintiff's medical records do not reflect this. However, the
25 Court notes that the portion of the worker's compensation form completed by P.A. Loranger does
26 contain a recommendation for an MRI. (Dkt. No. 50-3 at 51.)

1 On March 30, 2004, P.A. King met with plaintiff to discuss the progress of his L&I claim. (Dkt. No.
2 50-3 at 21.) On the same date, P.A. King completed a consultation request for plaintiff to receive an
3 MRI of his lumbar spine at Valley General Hospital and she requested that plaintiff receive a pre-
4 MRI x-ray of his face to check for foreign bodies; *i.e.*, metal. (*Id.* at 49 and 57; Dkt. No. 52-2 at 42-
5 44.) P.A. King also issued a Health Status Report authorizing plaintiff to receive a work belt, a cane,
6 extra pillows, an extra blanket, and a foam wedge. (Dkt. No. 50-3 at 28.) The requested x-rays were
7 taken on March 31, 2004, and the MRI was performed on April 12, 2004. (Dkt. No. 52-2 at 44-45.)

8 Plaintiff was seen by Dr. Champoux on May 14, 2004. (Dkt. No. 50-3 at 62.) After
9 examining plaintiff, and reviewing the MRI, Dr. Champoux diagnosed plaintiff with “multi-level
10 degenerative disk disease lumbar spine.” (*Id.*) Dr. Champoux then reviewed with plaintiff the role
11 of regular aerobic conditioning and oral anti-inflammatory medication in his treatment. (*Id.*) Dr.
12 Champoux indicated in his report that he did not believe additional diagnostic tests were indicated at
13 that time. (*Id.*)

14 On May 18, 2004, shortly after plaintiff’s appointment with Dr. Champoux, the Department
15 of Labor and Industries closed plaintiff’s claim on the grounds that plaintiff’s medical record
16 indicated that treatment for the claim had been concluded. (Dkt. No. 52-2 at 83.) Plaintiff requested
17 that the decision to close his claim be reconsidered. (Dkt. No. 52-3 at 11.) Plaintiff’s request for
18 reconsideration was initially denied because plaintiff’s attending physician had not provided the
19 Department of Labor and Industries with any record of needed treatment for plaintiff’s injury.² (*Id.*
20 at 14.) However, plaintiff appealed and the order closing plaintiff’s claim was cancelled. (*Id.* at 15-
21 16.)

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23 ² The record reflects that on April 21, 2004, the Department of Labor and Industries sent a
24 letter to Dr. Champoux requesting an up to date medical report regarding plaintiff’s condition. (Dkt.
25 No. 52-2 at 81.) Dr. Champoux had not yet evaluated plaintiff at the time of that request. It appears
26 that Dr. Champoux never responded in any fashion to the request from L&I.

1 Plaintiff's claim apparently remains open at this time. The Court notes that plaintiff appears to have
2 an attorney assisting him with his L&I claim at this juncture.

3 On October 31, 2006, plaintiff was evaluated by John Maxwell, M.D. (*See* Dkt. No. 52-3 at
4 18-24.) That evaluation was apparently conducted at the request of the Department of Labor and
5 Industries. (*See id.*) Dr. Maxwell noted that plaintiff was fairly functional and that he had been on
6 an exercise program for a long period of time. (*Id.* at 23.) He further noted that there were
7 preexisting degenerative changes of the spine and that there were some signs of nerve root
8 impingement. (*Id.*, at 23.) Dr. Maxwell indicated that the prospects for improvement were marginal
9 and he questioned whether any surgeon would feel comfortable operating on plaintiff's back. (*Id.*)
10 Dr. Maxwell recommended that plaintiff be evaluated by a neurosurgeon for consideration of whether
11 surgery was a viable option given the nature of plaintiff's back problem. (*Id.*)

12 On March 28, 2007, a second MRI was performed on plaintiff's back and, on May 29, 2007,
13 Sanford J. Wright, Jr., M.D., conducted a neurological consultation. (Dkt. No. 50-3 at 6-8.) It
14 appears from the record that plaintiff's evaluation by Dr. Wright was done pursuant to plaintiff's
15 request. (*See* Dkt. No. 50-2 at 37.) Dr. Wright noted that he saw no immediate indication for
16 surgery and recommended that plaintiff be given an opportunity to have physical therapy. (Dkt. No.
17 50-3 at 8.) Dr. Wright also noted that the more recent MRI was very comparable to the 2004 MRI
18 scan films. Dr. Wright, it appears, referred plaintiff to the Rehabilitation, Sports & Spine Center.
19 (*Id.* at 10.) Plaintiff was evaluated there by Thomas Seib, M.D. in July 2007. (*Id.* at 10-12.) Dr.
20 Seib recommended physical therapy. (*Id.* at 11.) Dr. Seib also suggested that plaintiff be re-
21 evaluated for other treatments after the physical therapy sessions. (*Id.*)

22 Plaintiff filed the instant action in Snohomish County Superior Court in January 2006. (*See*
23 Dkt. No. 1.) Defendants removed the case to this Court in March 2006. Defendants filed their
24 summary motion on September 21, 2007. (Dkt. No. 50.) Plaintiff has filed a response to defendants'
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1 motion (Dkt. No. 52) and defendants' have filed a reply brief in support of their summary judgment
2 motion (Dkt. No. 53). Defendants' motion for summary judgment is now ripe for review.

3 Summary Judgment

4 Summary judgment is appropriate when, viewing the evidence in the light most favorable to
5 the nonmoving party, there exists "no genuine issue as to any material fact" such that "the moving
6 party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is a fact
7 relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
8 248 (1986). Genuine issues of material fact are those for which the evidence is such that "a reasonable
9 jury could return a verdict for the nonmoving party." *Id.*

10 In response to a properly supported summary judgment motion, the nonmoving party may not
11 rest upon mere allegations or denials in the pleadings, but must set forth specific facts demonstrating a
12 genuine issue of fact for trial and produce evidence sufficient to establish the existence of the elements
13 essential to his case. *See Fed. R. Civ. P. 56(e)*. A mere scintilla of evidence is insufficient to create a
14 factual dispute. *See Anderson*, 477 U.S. at 252.

15 Claim One: Eighth Amendment

16 Plaintiff alleges in his second amended complaint that defendants P.A. Loranger, Dr.
17 Champoux, and Dr. Kenney have violated his rights under the Eighth Amendment by denying him
18 timely and appropriate medical treatment for his lower back injury. Plaintiff contends that these
19 defendants, because of their failure to act, have caused him months of prolonged pain and suffering
20 which constitutes deliberate indifference.

21 The Eighth Amendment imposes a duty upon prison officials to provide humane conditions
22 of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This duty includes ensuring that
23 inmates receive adequate medical care. *Id.* In order to establish an Eighth Amendment violation, a
24 prisoner must satisfy a two-part test containing both an objective and a subjective component. The
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1 Eighth Amendment standard requires proof that (1) the alleged wrongdoing was objectively "harmful
2 enough" to establish a constitutional violation; and (2) the prison official acted with a sufficiently
3 culpable state of mind. *Farmer v. Brennan*, 511 U.S. at 834. The objective component of an Eighth
4 Amendment claim is "contextual and responsive to 'contemporary standards of decency'" *Hudson v.*
5 *McMillian*, 503 U.S. 1, 8 (1992)(quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). The state of
6 mind requirement under the subjective component of the Eighth Amendment standard has been
7 defined as "deliberate indifference" to an inmate's health or safety. *Farmer v. Brennan*, 511 U.S. at
8 834.

9 Defendants argue in their summary judgment motion that plaintiff has not demonstrated that
10 they were deliberately indifferent to a serious medical need and that plaintiff's Eighth Amendment
11 claim must therefore be dismissed. Defendants offer in support of their summary judgment motion
12 excerpts from plaintiff's deposition, plaintiff's responses to defendants' interrogatories and requests
13 for production, copies of plaintiff's medical records, and the declaration of P.A. Loranger.

14 Plaintiff argues in his response in opposition to defendants' summary judgment motion that
15 the care he received from defendants was inadequate because the only treatment defendants provided
16 for his injury was pain medication which did not relieve his pain. Plaintiff contends that defendants
17 refused to conduct the tests that plaintiff's symptoms called for, and that they delayed his access to
18 medical personnel qualified to exercise judgment about his specific medical problem. Plaintiff offers
19 in support of his opposition brief his own declaration and exhibits which include copies of his
20 Department of Corrections medical records, reports from physicians outside the Department of
21 Corrections, and plaintiff's personal medical journal.

22 The record before the Court establishes that plaintiff first sought care for his back pain four
23 days after he sustained the injury. (See Dkt. No. 50-2 at 22-23.) Plaintiff was treated by a nurse and,
24 according to plaintiff's own report, that treatment provided some relief. (*Id.* at 24-25; Dkt. No. 50-3
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1 at 16-17.) Plaintiff was seen the next day by P.A. Loranger who provided medication, a work belt,
2 and time off from work. (Dkt. No. 50-3 at 46.) When plaintiff returned to P.A. Loranger ten days
3 later with muscle spasms and ongoing pain, plaintiff was admitted to the hospital for treatment. (*Id.*
4 at 18.) Dr. Kenney evaluated plaintiff following his admission to the hospital and provided steroid
5 injections and pain medication. (*Id.* at 36-38.) On the second day of his hospitalization, plaintiff
6 refused all pain medications, and plaintiff was released from the hospital on the fourth day after
7 reporting that his pain was resolved. (*Id.* at 40-42.) Plaintiff was subsequently provided with a cane,
8 an MRI, and an evaluation by an orthopedic surgeon who recommended conservative treatment in
9 the form of aerobic conditioning and oral anti-inflammatory medication. (*See id.* at 27-28 and 59-
10 62.)

11 Plaintiff complains that defendants efforts at pain management were not effective. However,
12 the medical records provided by the parties reveal that on the occasions when plaintiff sought
13 treatment for pain, he received treatments which did, in fact, provide him some relief. Plaintiff also
14 complains that he did not receive an MRI until approximately four months after he suffered his
15 injury. While this is true, plaintiff offers no evidence that this delay resulted in serious injury or
16 subjected him to any unnecessary pain.

17 Plaintiff contends that he should have been given access to outside medical providers who
18 could have provided him specialized care for his injury. However, at his deposition, plaintiff
19 admitted that he never asked any of the defendants to make an appointment for him with a doctor
20 outside the institution. (Dkt. No. 50-2 at 37-38.) Plaintiff also admitted that defendants never
21 prevented him from getting the second opinion he wanted regarding his condition, they simply did
22 not do anything to assist him in obtaining one. (*Id.* at 38-39.) Plaintiff offers no authority to support
23 the proposition that defendants had an obligation to assist him in obtaining outside medical care for a
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1 condition that they were able to treat.³

2 Finally, plaintiff contends that he never received any physical therapy for his back injury
3 despite a number of recommendations from his medical providers that he receive such treatment.
4 However, the record is devoid of any evidence that plaintiff ever pursued such treatment through the
5 Department of Corrections.

6 While plaintiff clearly believes that defendants did not do enough to treat his back injury,
7 there is simply no evidence in the record that defendants were deliberately indifferent to plaintiff's
8 medical needs. Accordingly, defendants are entitled to summary judgment with respect to plaintiff's
9 Eighth Amendment claim.

10 Claim Two: Fourteenth Amendment

11 Plaintiff alleges in his second amended complaint that P.A. King, P.A. Loranger, Dr. Kenney,
12 and Dr. Champoux violated his rights to due process and equal protection when they deprived him of
13 rights and entitlements under the Worker's Compensation laws without fair notice or a hearing.

14 *1. Due Process*

15 The Fourteenth Amendment provides that no state shall deprive any person of life, liberty or
16 property without due process of law. The essence of plaintiff's due process claim is that defendants
17 deprived him of a property interest when they mismanaged his L&I claim. Plaintiff contends that
18 when defendants assumed the responsibility of providing care for his industrial injury, they also
19 assumed responsibility for managing his L&I claim. Plaintiff contends that defendants mismanaged
20 his L&I claim which resulted in the closure of the claim and the denial of benefits under RCW Title

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22 ³ Plaintiff suggested at his deposition that a specialist may have been able to provide different
23 treatment than that provided by defendants, but he could not explain what he thought a specialist
24 might be able to provide that defendants could not. (See Dkt. No. 50-2 at 41-42.) Moreover, even
25 assuming a specialist did recommend some different form of treatment, differing opinions on medical
26 treatment do not amount to a violation under the Eighth Amendment. See *Sanchez v. Vild*, 891 F.2d
240, 242 (9th Cir. 1989).

1 51.

2 There is some support in the record for plaintiff's contention that defendants mismanaged his
3 L&I claim. Pursuant to RCW 51.36.060, physicians attending injured workers are required to "make
4 such reports as may be requested by the department . . . upon the condition or treatment of any such
5 worker." Dr. Champoux was identified to the Department of Labor and Industries as one of
6 plaintiff's doctors. (See dkt. No. 52-2 at 79.) On April 21, 2004, the Department of Labor and
7 Industries sent Dr. Champoux a request for an updated medical report regarding plaintiff's condition.
8 (See Dkt. No. 52-2 at 81.) Dr. Champoux apparently never responded to that request and, as a result,
9 plaintiff's L&I claim was closed on May 18, 2004. (See Dkt. No. 52-3 at 14.) Arguably, Dr.
10 Champoux did mismanage plaintiff's L&I claim when he failed to fulfill his duties under RCW
11 51.36.060. However, as defendants correctly point out, plaintiff's L&I claim was subsequently
12 reopened. Plaintiff offers no evidence that he was denied any benefits to which he was entitled under
13 RCW Title 51 as a result of defendants' "mismanagement" of his claim. Accordingly, defendants are
14 entitled to summary judgment with respect to plaintiff's due process claim.

15 2. *Equal Protection*

16 In order to state an equal protection claim under § 1983, a plaintiff must show that the
17 defendants acted with an intent or purpose to discriminate against the plaintiff based upon
18 membership in a protected class. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).
19 Plaintiff contends that as an inmate working in a class I correctional industry he was a member of a
20 protected class and he was entitled to the full benefits available under RCW Title 51. Plaintiff
21 appears to be of the belief that defendants' alleged mismanagement of his L&I claim denied him his
22 right to equal protection. However, plaintiff offers no authority for the proposition that he was a
23 member of a protected class. Moreover, plaintiff offers no evidence demonstrating that any of the
24 defendants knowingly or intentionally discriminated against him. Finally, as noted above, plaintiff

1 has not established that he has been denied any benefits to which he is entitled under RCW Title 51
2 as a result of defendants' conduct. Accordingly, defendants are entitled to summary judgment with
3 respect to plaintiff's equal protection claim as well.

4 Claims Three, Four and Five: Negligence/Medical Malpractice

5 Plaintiff alleges in his complaint that defendants not only violated federal law, but violated
6 state law as well. The Supreme Court has stated that federal courts should refrain from exercising
7 their pendent jurisdiction when the federal claims are dismissed before trial. *United Mine Workers v.*
8 *Gibbs*, 383 U.S. 715, 726 (1966). Because defendants are entitled to summary judgment with respect
9 to plaintiff's federal constitutional claims, plaintiff's state law claims should be dismissed without
10 prejudice.

11 CONCLUSION

12 For the reasons set forth above, this Court recommends that defendants' motion for summary
13 judgment be granted and that this action be dismissed with prejudice as to plaintiff's Eighth and
14 Fourteenth Amendment claims, and without prejudice as to plaintiff's negligence and medical
15 malpractice claims. A proposed order accompanies this Report and Recommendation.

16 DATED this 22nd day of January, 2008.

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19 MONICA J. BENTON
20 United States Magistrate Judge